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Liberalism and Legal Science: The Jurisprudence of Morris Raphael Cohen

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LIBERALISM AND LEGAL SCIENCE: THE JURISPRUDENCE OF MORRIS RAPHAEL COHEN

I. Introduction

Liberalism today is engulfed by a "semantic bedlam"[1] and besieged on both the left and right. Eric F. Goldman found that self-avowed liberals disagree among themselves as to what the term means.[2] For some the appellation connotes a willingness for peaceful change, a progressive outlook shared by reform-minded persons. Originally conceived as a rationale of individual freedom, and later embodied by romantic nationalist aspirations, some contemporary liberals militate against the very institutions which their predecessors thought necessary for the preservation of individual freedom and the state.[3]

Certainly, no set of associated ideas remains static in the face of history. Liberalism in America underwent a radical shift in orientation during the latter half of the nineteenth century. By the third decade of the twentieth century, new ideas had taken firm root. Much of the current confusion concerning liberalism results from social change which occurred during those years. If a particular kernel of the older or classic liberal doctrine remains alive today, altered manifestations of these key principles are, therefore, understandable. Even the most vociferous critics of liberalism (whatever their political persuasion) can hardly deny its continuing influence on American thought. However, due to intellectual confusion with regard to the meaning of liberalism, the nature of that influence is unclear.

Morris Raphael Cohen attempted to identify the central truths of liberalism. In doing so, he sought to mediate between the old and the new liberalism. His jurisprudence consists of a legal science grounded on liberal principles. Cohen meant to reconcile polar opposites—the metaphysical and the positivistic views of law—as they were reflected at different stages in American liberal jurisprudence.[4]

This note reviews the bifurcated growth of liberalism in America and, on this basis, argues for the need of legal science as envisioned by Cohen. The timeliness of this argument is reflected in recent attempts to formulate new liberal oriented ideologies or to resurrect classic liberalism. As seen below, the works of Theodore Lowi, John Rawls, and others typify these efforts. Particular criticisms of the newer form of liberalism are considered, and it is shown how a constructive interpretation of Cohen's legal science constitutes a framework within which a usable liberal jurisprudence can be developed.[5]

1 Goldman, *Foreword* to E. GOLDMAN, RENDEZVOUS WITH DESTINY at v (rev. abr. ed. 1956) [hereinafter cited as GOLDMAN].

2 *Id.*

3 Thus although liberals are often identified with a "big government" ideology, they are also associated with the supra-nationalistic objective of international or world union. Meanwhile, critics on the political left malign liberalism as the mainstay of middle-class dominance over the poorer laboring classes. And conservatives who adhere to the classic liberal doctrine of *laissez faire* economics attack big spending liberal governments which must, necessarily, tax big as well.

4 D. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL 171 (1975) [hereinafter cited as HOLLINGER].

5 Reid, *Morris Cohen's Case for Liberalism*, 33 THE REV. OF POL. 489 (1971).

II. Classic Liberalism

A. *Natural Rights Philosophy*

American legal thought developed amid other intellectual pursuits. Its connection with philosophy is especially strong. Until the advent of the secular university, the major contributors to American philosophy were clergymen and lawyers. Jefferson and the other founding fathers thus viewed themselves not only as political engineers but also as universal philosophers, products of the Enlightenment, an Age of Reason.[6] The original documents of American independence and statehood espouse their natural rights philosophy[7] which, until the latter half of the nineteenth century, comprise the major tenets of American liberal jurisprudence.

Classic liberal doctrine defends the natural rights of the individual and the invisible harmony of society. Justice is considered a form of nature and manmade law must conform to natural law if the former is also to be just. Translation of the absolute moral qualities of justice into positive law is accomplished by logical deduction. Individual human reason thus reaches beyond the corporeal world to the unseen realm of moral values. Accordingly, political institutions must give full rein to the individual to bargain his own contracts, to hold and dispose of his own property, and to run his own government. Classic liberals thus consider republican government to be the most just political arrangement. Furthermore, equality before the law is classic liberalism's judicial aspect: both the plaintiff and defendant compete as equals to show the better reason for their side; that they are social unequals is irrelevant. The function of the judge is to coordinate individual rights and administer remedies when due. This is the sporting theory of justice used at common law. Classic liberalism also means *laissez faire* economic policy: the government should leave the individual alone while society's natural harmony or "invisible hand" automatically regulates supply and demand.

B. *English and Scottish Origins of Classic Liberalism*

The faith which Jefferson and others placed in the inherent reasoning ability and moral inclinations of man stem from a long history of ideas. Notions of natural rights and harmonies date back at least to the ancient Hebrews and Greeks. The ideas received renewed emphasis in the Middle Ages, when Saint Thomas Aquinas sketched what he thought was the tripartite structure of God's laws.[8] However, none of these beliefs directly influenced the founding fathers, for they were guided by more recent philosophers, especially John Locke[9] and the Scottish realists.[10]

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6 A. KOCH, POWER, MORALS, AND THE FOUNDING FATHERS: ESSAYS IN THE INTERPRETATION OF THE AMERICAN ENLIGHTENMENT, 1-2 (1961).

7 C. BECKER, THE DECLARATION OF INDEPENDENCE—A STUDY IN THE HISTORY OF POLITICAL IDEAS 26-27 (1970) [hereinafter cited as BECKER]; M. COHEN, *The Bill of Rights Theory,* in LAW AND THE SOCIAL ORDER 148-49 (1933).

8 D. LLOYD, THE IDEA OF LAW 70-81 (1964) [hereinafter cited as LLOYD].

9 BECKER, *supra* note 7, at 27.

10 Address by Murray Murphey, University of Notre Dame (Feb. 21, 1977) [hereinafter cited as Murphey]; R. Petersen, Scottish Common Sense in America 1768-1850: An Evalua-

1. John Locke

John Locke wrote with revolution in mind. His second treatise, a "kind of political gospel"[11] in colonial America, aimed to refute the theory of a divine right of kings. Prior to the Reformation, monarchs justified their authority on the basis of a compact with the deity. Under this compact the ruler committed himself to deal righteously with his subjects. If he failed to do so, the subject could be absolved from allegiance through Papal intervention. But with the decline of Papal authority in the sixteenth century, monarchs began to claim unlimited grants of power from God. During the seventeenth century, therefore, people sought a rationale to repudiate this divine right of kings and to justify revolution.[12]

Locke's solution postulated a hypothetical state of nature. He wondered what man is like in a pre-governmental, pre-legal environment. In such a state what are the laws of nature to which all men must conform? His answer typifies the classic liberal position:

> The state of nature has a law to govern it, which obliges everyone: and *reason, which is that law,* teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. . . .
>
> In transgressing the law of nature, the offender declares himself to live by another rule than that of *reason and common equity,* which is that measure God has *set to the actions of men.* . . .[13]

Furthermore, because reason is the distinctive divine spark of humanity, Locke concluded that individual reason is the only legitimate or moral basis of government; good government is consequently republican government because only in a republic does individual reason rule. Such a government only follows from a social contract into which rational men freely enter:

> Men being, as has been said, all free, equal, and independent, no one can be put out of his estate, and subjected to the political power of another, without his consent. The only way, whereby any one divests himself of his liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community. . . .[14]

2. Scottish Realism

Though Locke's influence on the founding fathers is widely reported, the school of Scottish Realism held the most extensive and long-lasting sway over

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tion of Its Influence (July 17, 1963) (unpublished thesis submitted to the Faculty of the Graduate School of The American University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy).

11 BECKER, *supra* note 7, at 27.

12 *Id.* at 28.

13 J. LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 6 (1937).

14 *Id.* at 63.

the intellectual life of the young country. Until the latter half of the nineteenth century, popular notions of human nature hinged on the Realist concept of moral sensibility. Just as one sees with his eyes so one perceives the moral order of nature with his reason. By analogy, the criminal is one whose moral senses are at least temporarily blinded. The object of law is to teach him to see again. A scientifically respected penological philosophy of rehabilitation thus came into widespread use as a result of the concept of moral sensibility.[15]

Yet the doctrines of the Scottish realists were also put to less broadly humanitarian ends. Moral sensibility, unlike Locke's assumed state of nature and nature's laws, is not intrinsically supportive of popular sovereignty. Some people become permanently blind if the surrounding environment is inhospitable to positive moral behavior. Such moral degeneration is genetically transferable. While Jefferson, for example, trusted all normal men, i.e. those whose moral sensibilities have not been permanently impaired, he feared those people whose past precludes their cure.[16] This fear of a morally corrupt racial or ethnic group helps to explain Jefferson's ambivalence on the question of slavery. Given a state with a vanishing frontier and increasing scarcity of unclaimed land, this concept becomes a defense for the established propertied class, providing a rationale for holding the impoverished immigrant in a subordinate position.

III. Transition: Decline of Classic Liberalism and Rise of New Liberalism

Such a condition existed in the United States in the late nineteenth and early twentieth centuries. Waves of east European immigrants entered the hitherto Anglo-Saxon country seeking liberty and prosperity. Instead, they found themselves cooped up in decrepit urban slums. Industrialization produced sweat shops and factories. Employers could not treat their numerous employees with the sort of individualized attention intrinsic to the classic liberal ideology. The mass society was born; to get humane working conditions and decent wages, old tactics and ideas had to be discarded.[17]

The metaphysics of moral sensibility and abstract natural order underwent a rapid decline. Scientific refutation of Realist penology and the inability of metaphysicians to clearly articulate the source or functions of the abstract moral law contributed to this decline. In addition, the discoveries of Charles Darwin and the social applications of those discoveries by Herbert Spencer turned men's heads away from metaphysics. Social Darwinism offered the vision of historical evolutionary social development. The propertied class found a new ideology: if those who survive are the fittest, then surely it is the wealthy man who has proven himself the most fit member of society. Despite its rejection by Justice Oliver Wendell Holmes, Jr. in the famous *Lochner* case,[18] this ideology con-

15 Murphey, *supra* note 10.
16 *Id.*
17 GOLDMAN, *supra* note 1, at 65.
18 Lochner v. New York, 198 U.S. 45, 74 (1905). In *Lochner*, the Supreme Court declared a New York maximum ten hour working day statute to be an unconstitutional interference with the liberty of the individual to contract. 198 U.S. at 46. Holmes' dissent argued against the classic liberal laissez faire doctrines at the root of the majority opinion. "This case is decided upon an economic theory which a large part of the country does not entertain." 198 U.S. at 75. Legislatures, Holmes stated, should not be pre-empted by the courts simply because the economic convictions of judges would have produced a different result. Freedom

tinued to flourish. But Social Darwinism also instigated a new school of liberal thought which dealt with the complexities of mass industrial society.[19]

IV. New Liberalism

New liberalism formed around a sociological perspective of strife between individuals and among groups. This scenario accorded with the Darwinian picture of constant struggle for survival. The new liberals recognized that individuals could not always be entrusted with their own welfare. Man's fight against man is too intense. Industrialized society, furthermore, is not self-regulating because ownership of the means of production provides the propertied class with historically unparalleled power over other individuals.

A new school of liberalism developed in response. Whereas classic liberal jurisprudence had advocated the sanctity of contract and property, and the equality of all individuals, the new liberalism subordinated all of these factors to the public interest.[20] In addition, *laissez faire* principles yielded in the face of economic crises. The failure of private humanitarian aid and state general assistance programs pointed to a need to solve the problems of mass unemployment through comprehensive social welfare legislation.[21] Additionally, government fiscal policy, it was expected, could smooth the business cycle and prevent future financial calamities.

Jurisprudential and philosophic thinkers, influenced by the socio-cultural picture drawn by Spencer and the realities of industrial life, banded together in a "revolt against formalism."[22] Formalism, an outlook more than a perspective, betokens an exaltation of form over substance, ideal over material reality. Locke's concept of natural rights and Realist moral sensibilities both partook of a formalist orientation. That is, they appealed to an ideal world of natural morality to provide a guide for human behavior. John Dewey, in philosophy, and Oliver Wendell Holmes, Jr., in jurisprudence, led the way to a non-metaphysical, almost strictly empirical, analysis of social functions.

A. *John Dewey*

Dewey's instrumental philosophy "holds that ideas are plans of action, and not mirrors of reality . . . and that philosophy ought to free itself from meta-

of contract meant in this context a victory of the rich man's interpretation of Social Darwinism. Holmes rejected this point of view: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." 198 U.S. at 75.

19 GOLDMAN, *supra* note 1, at 73. Goldman distinguishes these tendencies by the terms, "Conservative Darwinism" and "Reform Darwinism." *Id.*

20 R. POUND, ADMINISTRATIVE LAW 11 (1942). Pound explains the difference "between 'the coordinating law,' which secures interests by reparation and the like, treating all individuals as equal, and the 'subordinating law,' which prefers some, or the interests of some, to others according to its measure of values." *Id.* This distinction was originally made to explain the sudden expansion of subordinating, i.e. public, law in the twentieth century. At common law, public law was reduced to a branch of private law. Today this position is reversed. Public law seems to be eating up private law and practitioners can no longer depend solely on common law remedies. *Id.* at 12.

21 R. LEVY, T. LEWIS, & P. MARTIN, SOCIAL WELFARE AND THE INDIVIDUAL—CASES AND MATERIALS 51, 54 (1971).

22 M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11 (1949).

physics and devote itself to social engineering."[23] Innate reason or human instinct, Dewey found from his study of psychology, is unable to explain human conduct and attitudes. Recourse must be had to custom and habit. The idea of mind or inborn reason separated from the "cultural matrix,"[24] an idea which Locke and other classic liberals supported, thus found its repudiation in Dewey's "new psychology."[25] Man's moral character is the product of historical forces and, Dewey asserted,

> there is moral progress as well as moral order. This may be discovered by an analysis of the very nature of moral conduct, but it stands out more clearly and impressively if we trace the actual development in history.[26]

This "new" psychology is thus a historical social psychology; it looks to the moral evolution of human values. By discovering the course of man's ethical progression, we gain "guidance for the unsolved problems of life. . . ."[27]

From his new psychology, Dewey, therefore, adduced a method of social control:

> The need of the hour seems . . . to be the application of methods of more deliberate analysis and experiment. The extreme conservative may deprecate any scrutiny of the present order; the ardent radical may be impatient of the critical and seemingly tardy processes of the investigator; but those who have considered well the conquest which man is making of the world of nature cannot forbear the conviction that the crude method of prejudice and partisan controversy need no longer dominate the regulation of life and society. They hope for a larger application of the scientific method to the problems of human welfare and progress.[28]

B. *Oliver Wendell Holmes, Jr.*

The thread linking Dewey and Holmes is a common emphasis on the sociocultural aspects of human thought. But Holmes, unlike Dewey, did not consistently contribute to the effort toward moral progress through social experimentation. Ethics and logic, Holmes felt, are matters of conscience and subjective judgment. While he believed that the historical studies of ethical change which Dewey advocated are theoretically interesting, they contribute little to any truly "practical science" of society. Holmes, nevertheless, made valuable contributions to both the theoretical and practical sciences in the field of law.[29]

1. The Theoretical Science of Law

Study of legal history convinced Holmes that law is largely judge-made.

23 *Id.* at 7.
24 *Id.* at 19.
25 *Id.*
26 J. DEWEY & J. TUFTS, ETHICS 4 (1908) [hereinafter cited as DEWEY & TUFTS].
27 *Id.* at 4-5.
28 Dewey & Tufts, *Foreword* to DEWEY & TUFTS, *supra* note 26, at v.
29 *See* O. W. HOLMES, THE COMMON LAW (1881) [hereinafter cited as THE COMMON LAW]; O. W. HOLMES, COLLECTED LEGAL PAPERS (1920) [hereinafter cited as COLLECTED LEGAL PAPERS]; THE MIND AND FAITH OF JUSTICE HOLMES (M. Lerner ed. 1943).

Ethical values characteristic of a judge's social background are invariably injected into manmade (or positive) law. A theoretical legal science, while of little use to the practitioner, could sort out the intricate historical development of such ideas and "burst inflated explanations."[30] Holmes found, for example, that the needs which conjure up certain legal theories are often met, or simply disappear, while the ideas themselves persist in subsequent legal reasoning. The original purpose of such theories is forgotten, and tortured rationalizations of them evoke illogic and fictions from the bench or bar.[31] Note, for example, that the doctrine of sovereign immunity persists even though actions against government officials easily overcome the outdated and forgotten rationale which originally prompted its development.[32] The unwillingness of judges and political theorists to face up to the social impact and illogic of their reasoning is the sort of conservative formalism which Holmes most bitterly denounced.[33]

1. The Practical Science of Law

While Holmes' early work dealt with theoretical legal science, his later writings focused on the usefulness of practical legal science. Realizing that a single word contains more than one meaning, Holmes deliberately chose a practitioner's definition of law: "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."[34] The practical lawyer's job is to predict what a judge will decide. Just as scientists seek rules on the basis of which they can make valid predictions, so lawyers do the same. As practical scientist, however, the lawyer should not be swayed by personal ethics or value-laden deductions. By avoiding such moral and logical commitments, he can observe what is really going on within society and the courtroom.[35]

C. *Sociological Jurisprudence*

Holmes did not always clearly distinguish theoretical from practical legal science. His ambiguity allowed two different interpretations: the sociological and the realistic.[36] Roscoe Pound led the sociological effort; borrowing heavily from the work of Dewey, Pound treated moral values as facts within a socio-historical continuum. While Locke, the classic liberal, talked about rights, Pound spoke of claims or social interests. Pound's jurisprudence is, in fact, a five-step effort aimed at determining the scope and subject matter of a legal system. The five steps include:

30 O.W. HOLMES, *Law in Science and Science in Law,* in COLLECTED LEGAL PAPERS, at 225.

31 THE COMMON LAW, *supra* note 29, at 5. Liberalism itself, as illustrated in this note, was created for one purpose; but under changed circumstances it was refitted for other ends. Only a certain family resemblance between the objectives of old and new liberalism, i.e. a humanistic aspiration for individual welfare and social betterment, links the two together.

32 *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 209 (1963).

33 O.W. HOLMES, *The Path of the Law,* in COLLECTED LEGAL PAPERS, *supra* note 29, at 187. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Id.*

34 *Id.* at 173.

35 *Id.* at 179.

36 O.W. HOLMES, *Law in Science and Science in Law, supra* note 30, at 224-25.

1. a survey or inventory of social interests;
2. determining those interests which the law should secure;
3. determining the principles upon which such chosen interests should be defined and limited;
4. determining the means by which the law can secure them; and
5. taking account of the limitations on effective legal action.[37]

With his table of social interests, Pound hoped to build a system of legal norms to guide judicial and legislative action. He "intended to end the chaotic and episodic character of discussions of public policies by listing all of the main headings or classes of policies recognized in mature systems of law."[38]

D. *Legal Realism*

The legal realists, on the other hand, repudiated the overtly prescriptive character of Pound's generalized legal norms. Led by men like Karl Llewellyn, the realists thought that a value-free, objective analysis of the legal order corresponding to Holmes' practical science of law must precede any attempt to direct law toward particular social ends. Without a full knowledge of the law, generalized legal norms could not be implemented. Llewellyn identified nine "common points of departure"[39] characterizing the realist position:

1. The conception of law in flux, of moving law, and of judicial creation of the law.
2. The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other.
3. The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.
4. The temporary divorce of Is and Ought for purposes of study. . . . The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing. . . .
5. Distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing. Hence the constant emphasis on rules as 'generalized predictions of what courts will do'. . . .
6. Hand in hand with this distrust of traditional rules (on the descriptive side) goes a distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions. . . .

37 E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 518-19 (1953).
38 *Id.* at 523.
39 Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1235 (1931).

7. The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. . . . This is connected with the distrust of verbally simple rules. . . .
8. An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.
9. Insistence on *sustained and programmatic attack* on the problems of law along any of these lines . . . to pick up such ideas and set about *consistently, persistently, insistently to carry them through.*[40]

E. *New Liberal Jurisprudence*

The divergent approaches of the sociological and realist schools merge in their typically classic liberal concern for the maintenance of individual welfare and social improvement through law. Pound's subordination of positive law to organized social interests helped to create an intellectual climate conducive to the implementation of new public policies. The great surge of administrative law which followed was an effort by liberal legislators and jurisprudes to individualize justice in mass society, an ideal shared by both old and new liberals.[41] Similarly, a flood of social legislation was enacted which was concerned with individual welfare, subordinating such concern only to the public policy behind the particular statutory enactment.[42]

Even in the traditional areas of private law such as torts, property, and contracts, sociological jurisprudence inched its way.[43] Many court decisions weighed the equities against a legislatively mandated or judicially recognized public policy.

Nowhere is this more obvious than in the flood of civil rights legislation and decisions since 1954.[44] Liberals, still entranced by the Darwinian picture, no longer sought the classic liberal ideal of absolute equality. Instead, they set their sights on equal opportunity. This change is a measure of the diminished significance of the individual in mass society and the realization that all one can expect from life is an equal chance, not complete parity. It also represents a heightened awareness among new liberals of the society about them and, most importantly, a readjustment of old liberal ideals to new realities.

At the same time, legal realists carried forth the sort of analyses which Llewellyn demanded. They came up with significant results: model legislation incorporating social realities, and thereby giving positive law greater certainty for the average individual and easier predictability for the practicing attorney. The Uniform Commercial Code is representative. Written principally by Llewellyn, the Code integrates customary courses of dealing[45] and usages of

40 *Id.* at 1236-38.
41 K. Davis, Discretionary Justice—A Preliminary Inquiry 19 (1969).
42 R. Pound, *supra* note 20 at, 27-28 (1942).
43 Notable is the extension of strict liability in tort into areas traditionally reserved to contract and property. W. Prosser, Handbook of the Law of Torts 634-40 (4th ed. 1971). "The notion of 'public policy' involved in private cases is not by any means new to tort law . . . but it is only in recent decades that it has played a predominant part." *Id.* at 15.
44 Brown v. Board of Educ., 347 U.S. 483 (1954).
45 U.C.C. § 1-205.

trade[46] with the law. Never before had American statutory law so deeply committed itself to the regularized routine of everyday mercantile practices while at the same time leaving traditional principles of equity untouched.[47] New liberalism thus impressed its ideas on the law without abandoning its traditional values of individual welfare and social improvement. The Code's great success brought other uniform legislation in its wake.[48]

V. The Decline of New Liberalism

A. *Legal Positivism*

Despite the obvious achievements of new liberalism, criticism of it mounted in successive waves throughout the twentieth century. First, legal positivists denied the scientific validity or meaningfulness of ethical values. Imported from both England and the European Continent, legal positivism rested its notion of science on the existence of things which are empirically verifiable. Sense data is the sole criterion of what exists.

A true legal science, the positivists asserted, is based on observation, description, and generalization. A "Law of Nature is merely an observed persistence of pattern in the observed succession of natural things: Law is then merely Description."[49]

Values, by this measure, do not exist, and because values do not exist, talking about values is non-scientific. Indeed, such discussion is reduced by the positivists to mysticism. Consequently, the liberal ideology came under fire for having injected ethics into legal *cum* social science.[50]

Observation of human phenomena led the positivists to conclude that the essence of manmade law is coercion. Might literally is legal right. The jurisprudential task is to trace the ways in which coercion is exerted (primarily by the sovereign state), and to induce from these observations the most statistically probable laws of causality.

Whereas classic liberals deduced applications of natural law from immutable moral principles, the positivists denied the existence of non-sensory morality. For the positivist, therefore, the only scientific method is induction, not deduction.[51] In this way, new liberalism shared an empirical orientation with positivism while, at the same time, retaining the ethical drives of classic liberalism. However, because of the popularity of the positivist critique among philosophers and jurisprudes, new liberalism lost a great deal of its intellectual support.

B. *Alternatives to New Liberalism*

Beyond the pale of academic debate, new liberalism subsequently suffered

46 U.C.C. § 1-205.
47 U.C.C. § 1-103.
48 E.g., the UNIFORM CONSUMER CREDIT CODE, the UNIFORM CONSUMER SALES PRACTICES ACT, and the UNIFORM FRAUDULENT CONVEYANCE ACT.
49 A. WHITEHEAD, ADVENTURES OF IDEAS 41 (1933).
50 LLOYD, *supra* note 8, at 97.
51 HOLLINGER, *supra* note 4, at 147.

ideological attack from its own intelligensia as well as from radical leftists. These critiques began in the 1950's, with a more or less theoretical debate over the value of ideology,[52] and culminated in the alternative proposals of participatory,[53] juridical,[54] and the renewed classically liberal ideal of the state.[55]

1. The End of Ideology Argument

In the 1950's a collateral attack on liberal ideology ensued. Growing partly out of their frustration in failing to motivate the American working class, critics charged that ideology in America is meaningless. This is so because the rigid categories of conservative and liberal do not apply to the concrete realities of social institutions, and because the conservative-liberal dichotomy is itself a series of shared political principles.[56] There is, in short, no difference in the conservative-liberal distinction.

> The once unequivocal distinction between 'right' and 'left' had been damaged by the knowledge that combinations once alleged by extremist doctrines to be impossible—combinations like . . . progressive social policies and full employment under capitalization, large scale governmental controls with public liberties—are actually possible.[57]

This confusion of ideologies is the result of the history of liberalism. Classic liberalism became known as conservatism while a new liberalism grew out of societal exigencies.[58]

2. Participatory Democracy

A way had to be found, therefore, to construct a meaningful ideology which would effectively motivate people to achieve serious ideological objectives, e.g. a truly participatory democracy.[59] This effort was the New Left of the 1960's. It is doubtful, however, that the New Left ever became more than an uncoordinated effort to achieve certain specific goals: an end to the Indo-Chinese incursion and a commitment by national politicians to an end of racism.[60]

3. Juridical Democracy

The failure of the New Left to offer a serious ideological alternative led liberally-inclined persons to find their own. Theodore J. Lowi's *The End of*

52 Waxman, *Introduction*, in THE END OF IDEOLOGY DEBATE 3 (C. Waxman ed. 1968).
53 Students for a Democratic Society, *The Port Huron Statement*, in THE NEW STUDENT LEFT 16 (M. Cohen & D. Hale eds. 1966).
54 T. LOWI, THE END OF LIBERALISM—IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 297 (1969) [hereinafter cited as LOWI].
55 J. RAWLS, A THEORY OF JUSTICE (1971); Daniels, *Introduction*, in READING RAWLS—CRITICAL STUDIES OF A THEORY OF JUSTICE at xiii-xvi (N. Daniels ed. n.d.).
56 R. WOLFF, THE POVERTY OF LIBERALISM 3 (1968).
57 Shils, *The End of Ideology?*, in THE END OF IDEOLOGY DEBATE 52 (C. Waxman ed. 1968).
58 *Id.*
59 Students for a Democratic Society, *supra* note 53.
60 Waxman, *supra* note 52, at 5-6.

Liberalism[61] attacks the expansion of governmental activities under new liberalism. He calls for both a restoration of the *Schecter*[62] rule—requiring clear standards on which administrative quasi-judicial bodies must guide their decision-making—and greater use of administrative rule-making.[63]

Lowi views new liberalism as entailing an unprincipled delegation of discretionary power. Such a delegation of legislative power is inefficient and undemocratic. Furthermore, the accompanying delegation of judicial power is dangerous because courts decide primarily on the basis of well-established rules, the doctrine of *stare decisis,* while administrative organs do not.[64]

No doubt many of the recommendations which Lowi propounds are valuable ideas. In fact, the courts now do impose sophisticated standards on administrative bodies;[65] judicial oversight has also become more strict in recent years due to a better appreciation within Congress of real excesses in administrative discretionary power.[66] Additionally, rule-making requirements are today routinely contained in social legislation.[67] However, Lowi's ideas do not present an alternative to new liberalism, since a holistic ideology is not contained within his work and the end of liberalism, which the book's title forecasts, is nowhere to be found in society.

4. The Renewal of Classic Liberalism

What is presently occurring in society can best be described as a widespread disillusionment with government regulation, coupled with a search for workable values. Old values are being given new emphasis. The best example of this search within the area of jurisprudence is John Rawls' *A Theory of Justice.*[68] Rawls offers a vision of man in a virtual state of nature. His picture, a value-laden hypothesis from which he derives the conditions of justice, constitutes a reaffirmation of classic liberalism.

Most criticism of Rawls' conception of a state of nature—what he calls the original position—focuses on its unreality.[69] Even as a scientific hypothesis or a model from which applications of justice can be deduced, one wonders whether any productive ideas for society will take shape. For the purposes of this note, however the widespread notice given Rawls' effort indicates the interest taken in preserving liberalism and suggests the need for a liberal philosophy that does not suffer Rawls' theoretical difficulties.

VI. Toward a Restored Liberalism: The Philosophy and Jurisprudence of Morris Raphael Cohen

Morris Raphael Cohen dedicated much of his philosophic and jurispru-

61 Lowi, *supra* note 54, at 125-56.
62 Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Lowi, *id.* at 126.
63 Lowi, *id.* at 127, 299.
64 *Id.* at 299-300.
65 Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-52 (D.C. Cir. 1971), *cert. denied,* 403 U.S. 923 (1971).
66 The Administrative Procedure Act is the primary effort. 5 U.S.C. §§ 701-706 (1970).
67 *E.g.* 15 U.S.C. § 57a(b) (1970).
68 Rawls, *supra* note 55.
69 Daniels, *supra* note 55, at xviii-xxii.

dential writings to the preservation of liberalism. The remainder of this essay concentrates on how Cohen set about to accomplish that purpose, holding together old and new liberalism, and how his theory answers the valid criticisms of liberalism made by Lowi and others.

A. *Amor Dei Intellectualis*

Cohen's autobiographical writings,[70] and his daughter's *Portrait of a Philosopher*,[71] recount the influences which worked on his mind. More than most thinkers, Cohen's background and practical experience must be counted as the inspiration for his vision and insight. Probably, it is this human element which makes Cohen's thought so appealing. From his emigration as a Russian Jew to his philosophic education at Harvard and throughout his long career of writing and teaching, this human quality persisted.[72]

A strict religious background operated at the fountainhead of Cohen's mature philosophy. Raised in the orthodox Jewish faith, he spent a relatively large portion of his boyhood in study and prayer. Even after he threw off the rituals of organized religion and rejected belief in an anthropomorphic deity, Cohen continued to relish the Judaic idea of an intellectual love of God (*Amor Dei Intellectualis*).[73] Traditionally, this concept rested on the divinity of truth. As espoused by Spinoza, learning literally brings one closer to God because God is everywhere in the world.

Cohen, however, accepted neither assumption. Conversant in philosophic and scientific knowledge, he postulated a metaphysical concept of eternity which lies beyond both space and time. Within the bounds of eternity there is continuous spatial and temporal flux, i.e. history, the concrete occurrences of physical reality. But the existence of eternity beyond historical change allows for an element of superior constancy relative to any change which does occur.

This vision of eternity over and above space and time may be compared to a jigsaw puzzle. When we work a jigsaw puzzle, each additional piece brings us closer to an understanding of the whole scene of the completed puzzle. The whole scene, however, is qualitatively different than the individual pieces. So it is with space and time and eternity. Only an increase of our knowledge concerning the interaction of space and time will afford us a better grasp of the whole scene, i.e. eternity. Yet eternity is qualitatively different than its components, space and time.

An increase of knowledge of spatial-temporal relations, therefore, adds new meaning to the nature of eternity. Herein lies the value of learning, especially scientific learning: orderly or systematic acquisition of knowledge brings man closer to an understanding of eternity.[74]

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70 M. COHEN, A DREAMER'S JOURNEY (1949).
71 L. ROSENFIELD, PORTRAIT OF A PHILOSOPHER (1962).
72 *Preface* to HOLLINGER, *supra* note 4, at xii.
73 M. COHEN, *The Intellectual Love of God*, in THE FAITH OF A LIBERAL 307 (1946).
74 *Id.* at 311-12. Cohen's discussion of eternity is patterned after the ideas of Spinoza. *Id.*

B. *Science*

The existence of eternity, Cohen thought, is not merely theologically comforting for those who can't find firm meaning in this ever-changing world. The existence of eternity is logically necessary for scientific thought of any sort, including legal science. Science, like philosophy, is a matter of building logically consistent systems. This construction takes place in two ways—deductive or inductive inference. Deductive inference begins with a generalized hypothesis and logically derives theoretical results. Those theories are then tested against observable phenomena. As previously indicated, classic liberals like Locke and Rawls employed deductive reasoning. Inductive inference, on the other hand, proceeds from observable occurrences to build generalized conclusions. The positivists and new liberals typically utilized such an approach.

Neither deductive nor inductive methods would retain any meaning, however, if there were no overall system, i.e. eternity, within which to fit the knowledge thereby obtained. A scientist who pursues knowledge, Cohen argued, implicitly assumes that there must be some order out there. Otherwise, he would not be learning anything from his investigations.[75]

C. *Jurisprudence: The Science of Law*

A judge or jurisprude similarly makes certain ethical assumptions when he decides a case or formulates a theory of law. Otherwise, the sole purpose of law, i.e. justice, would dwindle away and the legal order would become a meaningless exercise of governmental power. Cohen thus criticized the positivist concept of legal science as an inductive enterprise devoid of ethical content. On the other hand, Holmes was entirely correct when he observed the social biases of many judges. Rather than pursuing the positivist goal of trying to eliminate such prejudices—an impossible task which, even if it could be accomplished, would render the law meaningless—Cohen believed that social biases should be consciously articulated and controlled. Cohen thereby established himself as a critic of legal positivism while at the same time he put himself in the corner of new liberalism, especially sociological jurisprudence. For, like Pound, Cohen favored improved social control through law.

However, Cohen's attack on positivism transcended sociological jurisprudence by its insistence on more than the mere categorization of social interests. Such reordering of social priorities is necessary but is not, of itself, sufficient for a complete legal science. More or less aligning himself with classic liberalism, Cohen asserted that justice has an even more general ethical component. For instance, the classic liberals, who authored the Declaration of Independence and the Constitution, assumed the truth of certain ethical propositions.[76] We can apply these documents properly only if we incorporate such values into our legislative and judicial decision-making. The failure of judges to present their own ethical values up front subverts the aims of legal science.

75 *Id.* at 311.
76 *See* note 7 *supra.*

Whereas the value orientation of judges confuses the state of the law when it is hidden, when acknowledged it enables the law to take a step closer to the status of a logically complete system.

Cohen's legal science, then, may be viewed as an effort to give sociological jurisprudence a natural law foundation. Like the classic liberal, he looked to the establishment of general ethical rules from which legal decisions would be deduced. But Cohen held on to the empirical dimension to inform law-makers of the social realities involved in each particular case and in society at large. Both morals and empirical observation are thus necessary components of the ideal of a logically complete and consistent system of legal science.[77]

D. *Law and Morals*

At the same time, Cohen warned against the confusion of law and morals. The "is" of positive law and the "ought" of morality both go into his concept of legal science. Still, they are theoretically distinct:

> While I regard this integrative task [i.e. the introduction of values into our practical law-making] as necessary, it seems to me fatal to try to meet it by disregarding clear distinctions and confusing the theory of law with vague or questionable moral ideas and sentiments.[78]

Cohen here distinguished his concept of natural law from that of the classic liberals. Locke and many others had stipulated to the immutable goodness and applicability of certain particular social structures relevant to *all* societies, e.g. the sanctity of contract, property, etc. Cohen, however, hoped to unite natural law with natural science. He realized that different institutions are well suited for different geographical, ethnic, and racial units. Natural law has a changing content and only the most general moral propositions remain constant. Confusing our moral values with the condition of positive law too often means imposing our cultural biases on foreign societies. Cohen hoped to avoid this classic liberal tendency by his call for a clear distinction between morals and the law.[79]

E. *Liberalism and Legal Science*

Cohen's notion of legal science, grounded in natural law principles, is peculiarly tied to certain values commonly associated with liberalism. Liberalism, for Cohen, consists of

> a faith in enlightenment, a faith in a process rather than a set of doctrines, a faith instilled with pride in the achievements of the human mind, and yet colored with a deep humility before the vision of a world so much larger than our human hopes and thoughts. . . .

77 M. COHEN, *Philosophy and Legal Science,* in LAW AND THE SOCIAL ORDER 245 (1933).
78 M. COHEN, *Should Legal Thought Abandon Clear Distinctions?,* in REASON AND LAW 171 (1961).
79 *Id.*

> [L]iberalism means a pride in human achievement, a faith in human effort. . . . The philosophy back of that is summed up in two great faiths or beliefs: the belief in progress, and the belief in toleration. . . . [T]hose are the two fundamental ideas of liberalism.[80]

The classic liberalism of John Locke is grounded on a certain partisan political ideology, i.e. the inherent right of the people to revolt before tyranny. No doubt Cohen also would have defended the natural right of revolution in certain circumstances. But, unlike Locke, his primary aim was not a set of doctrines, e.g. the natural status of revolution. Rather, Cohen aimed for the more generalized principles of progress and toleration. Such ideals, he concluded, are logically necessary for free scientific inquiry. Conversely, rational inquiry unrestrained by governmental or private intervention is the *sine qua non* of liberal civilization.

Indeed, scientific inquiry, social progress, and toleration of differences are interdependent manifestations of Cohen's liberalism. Critical scientific inquiry thrives only within a tolerant environment in which differing ideas and opinions are freely exchanged. Scientific discovery in turn yields progress.[81] Progress is never limited by Cohen, however, to material betterment. Nor, as some critics charge, did Cohen's acceptance of social differences as the changing content of a single set of natural law principles bring him dangerously close to complacent acquiescence to the *status quo*.[82] Man's mind, Cohen believed, is always capable of improvement and cannot be reduced to material dependencies. Progress often takes the form of increased self-understanding. What is *is* right for a particular society in terms of its material organization though not formally right. Most societies, in fact, only approximate complete adherence to the principles of natural law.[83]

Progress, therefore, is not inevitable. Legal change, for example, is a matter of selecting certain rules from a host of other possibilities. Since the scientific jurisprude investigates all logical possibilities, he creates an open developing system in which the best rules are eventually uncovered. But a non-scientific selection process is not very likely to turn up the most ethically sound rule. Thus the likelihood of progress, as Cohen defined the term, hinges on the degree to which scientific inquiry is freely tolerated and applied.[84]

Cohen's legal science and liberalism, consequently, rest on a well-premised *laissez faire* of the mind. While restriction of the free thoughts of citizens is detrimental to social progress, unrestricted freedom of thought practically guarantees it. The mind is self-corrective, guided by an invisible harmony, even if society is not.

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80 M. COHEN, *The Future of American Liberalism,* in THE FAITH OF A LIBERAL 437, 449 (1946).

81 *Id.* at 450, 452.

82 HOLLINGER, *supra* note 4, at 178.

> Further, was not the method by which the "science of natural law" would eventually discover such invariants i.e. ethical principles dangerously close to historicism? If the ground of imperatives was the moral consensus of the race, would not one be resolving "ought" questions by collecting historical facts? *Id.*

83 M. COHEN, *Prologue: My Philosophy of Law,* in REASON AND LAW 12 (1961).

84 *The Future of American Liberalism,* note 80 *supra,* at 452.

F. *Rule and Discretion*

Furthermore, affirmation by Cohen of the possibility of legal science rests, as previously stated, on his recognition that both deductive and inductive thought processes are involved in judicial decision-making. Stated differently, the law utilizes both rule and discretion.[85]

The aim of legal science, like all sciences, is the construction of general rules from diverse facts. By these rules, new conclusions (judgments) can be deduced. Nevertheless, we must recognize that the possibilities of factual variation are endless. Hence no system of generalized rules will ever entirely supplant the use of discretion.[86]

Thus Lowi's criticism of the excesses of administrative discretion would be well taken by Cohen. Probably, however, Cohen would caution Lowi against thinking that greater judicial oversight will eliminate the use of discretion. Judicial decision-making always contains an element of discretion. Rather, what needs to be done is to examine the nature of discretion and its interaction with rules.[87]

G. *Logic in the Law*

1. Scientific Method

The susceptibility of law to scientific analysis implies that there is a logic akin to liberalism underlying positive legal enactments. Cohen identified three usages of the term 'logic': (1) "the tracing of the necessary implication and the clarification of our statements,"[88] (2) "the narrow hard-heartedness of those who in the name of logic or consistency cling to some rule or maxim as a premise without being willing to see its limitations . . . ,"[89] and (3) "certain aesthetic considerations, intellectual symmetries, or *elegantia juris*. . . ."[90] The second definition is symptomatic of the formalist type of thinking which Holmes and Dewey had attacked. The third meaning is that used by the aesthete; sometimes, however, it is used by the lawyer, judge, or natural law philosopher when they claim either an eternal harmony or a material analogy on which to base their reasoning.

From his reading of the work of Charles Sanders Peirce, a logical pragmatist, Cohen adopted the first definition as that most geared to liberal *cum* scientific pursuits. In a letter to Justice Holmes, Cohen wrote that his

> agreement with pragmatism extends to the main point made by Peirce, *viz.* that the way to make our ideas clear is to examine their possible consequences, or in technical language, their possible implications. It is an

85 M. COHEN, *Rule Versus Discretion*, in LAW AND THE SOCIAL ORDER 259 (1933).
86 *Id.* at 261.
87 *Id.* Such an examination is provided by the admirable work of Professor Davis on Discretionary Justice—A Preliminary Inquiry. *Supra* note 41. Critical analysis of Davis' work lies beyond the scope of this topic and would consume a lengthy digression. It is significant to note in this context, however, that Davis plainly relies on Cohen's description of legal change—the historical oscillation from rule to discretion, from formalism to reform—as one source of his own thoughts. *Supra* note 41, at 19.
88 *Prologue: My Philosophy of Law, supra* note 83, at 13.
89 *Id.* at 14.
90 *Id.*

> attempt to extend the experimental method to the handling of ideas, and very fruitful if used logically, for the very essence of intellectual liberality consists in the realization that what is familiar to us is only one of a number of possibilities.[91]

This exploration of all logical possibilities leaves room in the law for the conscious and measured infusion of ethical values. Legal science is also thereby saved from becoming merely a program of observation, description, and generalization as the positivists wished. Nor does it stop at the inductive boundaries drawn by the new liberal jurisprudes, i.e. sociological factors. Similarly, this conception of scientific method is distinguished from the abstract deductions made by the older school of natural law liberals.

Clearly, Cohen set his sights very high when he wrote about scientific method. The task is an impossible one; consideration of all logical possibilities is virtually an endless effort even in a fairly simple factual situation. Cohen, in fact, realized that only the introduction of evaluative guides will bring this exploratory process to a close. The evaluative guides which Cohen thought helpful are embodied in two concepts: the principle of polarity[92] and the notion of conceptual twilight zones.[93]

2. The Principle of Polarity

The principle of polarity relates to Cohen's observation that facts often take shape in the minds of men in terms of two opposite, contradictory positions. Aristotle's logical doctrine of contradiction is a generalized expression of this tendency.[94] Cohen's polarity principle applied not only to logical formulae but also to the entire corporeal world. It is defined as "the principle that opposite categories like identity and difference, rest and motion, individuality and universality, etc. must always be kept together though never identified."[95] When looking to see, for example, the extent to which ethics should be fitted into man-made legal judgments, the principle of polarity reminds us that a judgment devoid of ethical impact is impossible. Try as we may to achieve neutral principles, values are necessarily a part of judicial decisions. By means of this principle, then, we realize that progress in both legal science and other sciences, including philosophy, "can be made not by simply trying to prove that one side or the other is the truth, but by trying to get at the difficulty and determining in what respect and to what extent each side is justified."[96] The theorist is thereby prevented from taking either a purely classic natural law position, e.g. "Justice is law" or a positivist position, e.g. "Law has nothing to do with justice."

3. Twilight Zones

Sometimes, however, the polarities are not precisely opposing. In a complex

91 ROSENFIELD, *supra* note 71, at 326.
92 *Preface* to M. COHEN, REASON AND NATURE at xi, 165.
93 Cohen, *Concepts and Twilight Zones,* 24 J. PHIL. 673 (1927).
94 A thing cannot be and not be at the same time.
95 *See* note 92 *supra.*
96 *Id.*

issue it is not always easy to tell where one polarity ends and the other begins. An example of this is seen in the courts' struggle to separate that which is obscene from that which is not obscene, to determine when life begins and when it ends, and to fix the limits of just punishment as opposed to cruel and unusual punishment. The dividing lines between these polarities are obviously unclear. Acknowledging these complexities, Cohen asserted the existence of twilight zones: "From the point of view of the principle of polarity, twilight zones are regions about the point of equilibrium of opposite tendencies."[97]

The admission by Cohen of unclarity in our practical judgments and scientific theories won him the criticism of philosophers but the appreciation of scientists and lawyers. The philosophers thought that unclarity of any sort is not very helpful, and they wanted to know precisely how opposite categories interact. Those who actually worked with these concepts in a practical sense, on the other hand, appreciated Cohen's honesty and insight. Justice Cardozo was gratified, for example, to

> have won a forceful auxiliary in the philosophy of Prof. Cohen with its insistence upon twilight zones in the world of nature and of ideas, and upon the principle of polarity as the mediating force between them.[98]

For Cardozo, like Cohen, felt that

> the judicial process is one of compromise, a compromise between paradoxes, between certainty and uncertainty, between the literalism that is the exaltation of the written word and the nihilism that is destructive of regularity and order.[99]

H. *The Challenge of Liberalism and Legal Science*

The inherent normative content and scientific structure of the legal system led Cohen to challenge certain practices and dogmas of American law. He was among the first to attack the phonograph theory of judicial decision-making—the notion that judges find and do not make the law.[100] An unconscious or hidden establishment of new legal rules under the guise of *stare decisis,* legal fictions, or vague concepts like reasonableness, betrays the science of law. Agreeing with Holmes, Cohen similarly noted that use of the fourteenth amendment's due process and equal protection clauses often conceals deep-seated economic and ethical motives.[101]

97 *Concepts and Twilight Zones,* note 93 *supra,* at 679.

98 B. CARDOZO, *Jurisprudence* (Address before the New York State Bar Association Meeting, Jan. 22, 1932), in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 25 (M. Hall ed. 1947).

99 *Id.*

100 M. COHEN, *The Process of Judicial Legislation,* in LAW AND THE SOCIAL ORDER 113 (1933). According to the "the phonograph theory of the judicial function . . . the judge merely repeats the words that the law has spoken into him. . . ." *Id.*

101 *Id.* at 135. A recent law review article endorses the conscious application of ethical values to constitutional issues much as did Cohen. The author, like Cohen, believes that the best way to control discretion is to stipulate precisely what ethical problems are inherent to due process of law questions. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1976).

Legal science and liberalism also undergirded Cohen's critique of American legal education. He disparaged legal education for its failure to develop legal scientists. Knowledge of the general principles and social orientation of positive law should take priority over the study of minute details and the acquisition of mechanical skills. Even from a practical standpoint, the former would prove more beneficial in the long run. A legal scientist knows the contrasting values in a particular situation and makes intelligent decisions by weighing those values.[102] The mechanical jurisprude, on the other hand, adjudges facts solely on grounds of expediency and personal bias.

Throughout his work, Cohen repeatedly aimed toward placing liberal values and the law on a scientific foundation. Success meant the restoration of intellectual integrity to both. Ultimately, it meant the realization of greater tolerance, social progress, and a more ethically secure system of law. In the present days of challenge to accepted values and the law, a renewal of Cohen's liberalism and legal science is in order.

VII. Conclusion

The history of liberalism in the United States took a new direction at the end of the nineteenth century. Previous exponents of liberal doctrine asserted the existence of immutable values and social harmonies from which particular applications of justice could be deduced. Industrialism, the growth of mass society, and a new intellectual temper set by Charles Darwin prompted a liberal reaction. This new liberalism constituted a revolt against the formalism of classic liberalism. Sociological and realist schools grew up as efforts to explain society and the law on a nonmetaphysical, empirical basis. Subsequent disappointment with new liberalism engendered severe philosophical and political critiques of it. However, no serious ideological alternative was offered. As a result, some thinkers have turned back to classic liberal concepts. Others are still searching for a philosophical framework within which to place their typically liberal values.

Morris Raphael Cohen attempted to provide such a framework. Concerned with the renewal of an intellectually respectable liberalism, Cohen sought to lay a scientific foundation for it. His notion of legal science urges the admission of general ethical precepts to a scientific analysis of society. Judges should thus articulate both the sociological interests and the ethical pre-dispositions which guide their decision-making. In tying together law, science, and morality, Cohen believed that the key values of liberalism—social progress and toleration of personal differences—could be preserved. Considering the current disillusionment with the values of liberalism, Cohen's social philosophy and jurisprudence merit reconsideration.

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102 ROSENFIELD, *supra* note 71, at 195, 240-42, 297-300.